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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 237

C. B. WOOD, PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the circuit court of appeals, stating the reasons for the affirmance, appears at R. 115.

JURISDICTION

The judgment of the circuit court of appeals was entered May 29, 1946 (R. 115). The petition for a writ of certiorari was filed June 27, 1946. The jurisdiction of this Court is involved under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal

Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction for criminal contempt for violation of an order enjoining him from selling used automobiles in excess of O. P. A. ceiling prices.

2. Whether petitioner's conviction for criminal contempt after a trial without a jury should be reversed because the trial judge failed to state that he had applied the rule of reasonable doubt.

STATEMENT

On August 1, 1945 the respondent filed a petition in the United States District Court for the Western District of Tennessee (R. 6–7), praying for the issuance of an order directing petitioner to show cause why he should not be adjudged in contempt for violation of an order issued by that court on May 4, 1945, at the instance of the Administrator of the Office of Price Administration, enjoining petitioner from selling, transferring or disposing of any used passenger automobiles at prices in excess of the applicable O. P. A. ceiling prices (R. 5, 6). The district court issued an order to show cause on August 1, 1945 (R. 9), and, after a hearing before the court without a jury, at which both the Office of Price Administration and petitioner were given full opportunity to

be heard and present testimony (R. 13–101), petitioner was adjudged guilty of contempt and sentenced to imprisonment for 90 days (R. 105–106, 109). The conviction was supported by a statement of the trial judge's finding of facts.[1] On

[1] These findings were as follows (R. 101–102):

"* * * I find that on July 6th, 1945, Petty Officer J. G. Mallard entered into a deal with respondent Wood whereby Mallard agreed to trade his used 1939 Pontiac automobile to Wood in exchange for a used 1941 Chevrolet Coupe and pay Wood a difference of $700.00 in cash.

"Number 2, I find that in closing the deal, and at the instance of the respondent Wood, the transfer of the Pontiac was handled as a separate transaction, Wood paying Mallard a consideration of $682.00, which was the OPA ceiling price on that type of automobile.

"Number 3, Pursuant to the original understanding between the parties, Mallard, in settling with Wood, on delivery to him of the Chevrolet automobile in question, made two cash payments to Wood of $350.00 and $320.00 respectively, and, at the same time, obligated himself on the unpaid balance to a Finance Company in the sum of $700.00. Mallard, in settling with Wood for the Chevrolet Coupe, withheld payment of $12.00 pending repairs or replacement of the muffler on said Chevrolet automobile, which balance has never been paid to Wood.

"Number 4, Respondent Wood later, in regular course, was paid the sum of $700.00 by the Finance Company, making a total sum of $1,370.00 actually received by him for the sale of the used Chevrolet automobile in question, which amount was $320.00 in excess of the OPA warranted ceiling price of $1,050.00.

"The Court, therefore, finds the respondent Wood has sold and delivered a used Chevrolet automobile at a price higher than the Maximum Price permitted by Maximum Price Regulation Number 540 of the Office of Price Administration and in violation and disobedience of the Court's injunctive decree heretofore entered on the 4th day of April, 1945."

appeal to the Circuit Court of Appeals for the Sixth Circuit the conviction was affirmed (R. 115).

The evidence in support of the conviction may be summarized as follows:

On the afternoon of July 5, 1945, Chief Petty Officer J. G. Mallard, U. S. N., accompanied by Chief Petty Officer T. M. Johnson, U. S. N., drove into petitioner's combined parking and sales lot in Mallard's 1939 Pontiac automobile. At that time there was some discussion about petitioner's buying Mallard's car and selling him a used 1941 Chevrolet coupe. (R. 20, 49–50, 59.) The next morning Mallard returned to the lot and petitioner purchased his 1939 Pontiac for $682, the ceiling price, paying by check in that amount (R. 20–22, 32, 50, 59–60). Mallard left the lot for a short time to pay off the outstanding balance of a finance company loan on the Pontiac amounting to $319.17 (R. 21–23). He then returned and gave petitioner $350 or $338[2] in cash, and executed finance papers for a $700 loan to apply on the purchase of the used 1941 Chevrolet coupe (R. 33–35, 60–61, 64). Petitioner testified that the total agreed purchase price for the Chevrolet was $1,050 (the ceiling price) and that the foregoing $1,038 was the only payment he had ever received (R. 60, 62–63, 64, 73). His testimony was uncorroborated. On the other hand, Mallard tes-

[2] Mallard testified he gave petitioner $350 (R. 33) but petitioner claimed Mallard was short $12 and had only given him $338 (R. 60–61).

tified that he returned the next day and gave petitioner an additional $320, making a total of $1,370, and that the agreed sale price for the Chevrolet was the $700 received by financing plus the $682 petitioner gave him for his 1939 Pontiac (R. 33, 35–36). Johnson, who was with Mallard on all the occasions in question, corroborated the latter's testimony that the Chevrolet was to be purchased for Mallard's car plus $700 and that Mallard had given petitioner two cash payments on successive days (R. 50–51, 53). In addition a friend from whom Mallard had borrowed $320 to make the second payment to petitioner verified that loan and produced the cancelled check involved (R. 41–42). The witness testified that he knew at the time he wrote the check that Mallard was buying an automobile (R. 42).

ARGUMENT

1. Essentially the only dispute here is a factual one; did Mallard make two cash payments to petitioner or one. If the former, petitioner received $1370 as against the lawful O. P. A. ceiling price of $1050 for the 1941 Chevrolet coupe. While Mallard and petitioner flatly disagreed as to whether the second cash payment was made, Mallard's story was corroborated by two other witnesses; petitioner's testimony was, however, unsupported. Under these circumstances, there is no reason here to disturb the findings of the trial judge. See, e. g., *United States* v. *Aluminum*

Company of America, 148 F. 2d 416, 433 (C. C. A. 2); *Wittmayer* v. *United States,* 118 F. 2d 808, 811 (C. C. A. 9); *Oates* v. *United States,* 233 Fed 201, 206 (C. C. A. 4), certiorari denied, 242 U. S. 633.

We submit that the issue was properly disposed of by the court below when it stated that (R. 115):

> It appearing that the issue submitted to the district court was solely one of fact, that the finding made by the court is supported by substantial evidence, that we are not able to perceive any clear error therein nor any error in the procedure at the hearing or in the judgment and sentence, [the judgment must be affirmed].

Petitioner seeks to avoid the conclusiveness of the trial judge's findings by relying on the characterization of the transactions as a "swap" in which the price paid for the Chevrolet was $700 (finance money) plus Mallard's 1939 Pontiac, ignoring apparently the several cash payments passing between him and Mallard and their purposes. He then argues that in order to determine whether the Chevrolet was sold at a price over the ceiling of $1050 it was first necessary to find out what the reasonable [3] value of the Pontiac was

[3] Petitioner points out that under the applicable O. P. A. regulations (quoted in the Appendix to the petition for a writ of certiorari, pp. 22–23) a seller could take less than the ceiling price for his car, but a dealer could not require persons selling to him to accept less than "reasonable value" (Pet. 10–11).

(Pet. 7–12). But this is an artificial treatment of the issue litigated in the trial court. While the transactions might be described as an exchange of cars or a "swap," nevertheless, as the trial judge specifically found, the sales of the two cars were handled as distinct transactions (R. 102, see n. 1, *supra*). Petitioner himself testified that "they were two separate deals altogether" (R. 62). As the story unfolded at the trial, the only issue presented by either side was as to the number and total amount of cash payments made to petitioner on the purchase of the Chevrolet; the contention now made by petitioner was not urged. Moreover, even if the question of the value of the Pontiac could have any significance, all parties assumed and the evidence showed that it had a value of $682, the O. P. A. ceiling price. Petitioner gave Mallard a check for this amount for the Pontiac and admitted that Mallard was not then obligated to deal any further with him on the purchase of the Chevrolet (R. 66). Petitioner testified that when he and Mallard were negotiating for the sale of the Pontiac he "stepped back in the office and got the O. P. A. price ceiling, and told [Mallard] what the car was *worth*. He said he had had it checked before, and that was right. $682.00" (R. 59). [Italics supplied.] There is consequently no basis under the evidence for any view that the Pontiac was worth less than $682 and certainly not as little as $350, the maximum

figure which would have absolved petitioner from a price violation even under his present concept of the transactions.

2. Petitioner's second point is that the judgment of contempt cannot stand because the trial judge did not use the proper test in weighing the evidence, that instead he "used quite another standard, expressly stating the same in the words 'I have considered very carefully and I find * * *'. (Tr. 101). The use of these words excludes the possibility that the trial Judge gave any thought to the rule of reasonable doubt, which was applicable. While the trial Court may have considered the case very carefully, it is apparent that his finding was simply based upon a mere preponderance of the evidence, in the Court's opinion" (Pet. 21).

It should be sufficient answer to this objection also that it comes too late since it was not urged upon the trial judge. In any event, we do not believe that the trial judge's remark can be fairly read as anything other than as a statement that he had given the case serious consideration. The trial judge did not indicate what test or rule he had employed in weighing the evidence. But certainly being possessed of the technical competence of the bench he must be presumed, in the absence of some contrary indication, to have applied the correct rule. Any uncertainty in this regard would seem to be less than with respect to the ver-

dict of a jury of laymen, which need not be supported by their assurance that they applied the rule of reasonable doubt.

CONCLUSION

The decision below is correct and there is involved no question of importance or conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

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